

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





ORIGINAL

74-1818

To be argued by  
BERNARD S. MEYER

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Page 5

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**United States Court of Appeals**

FOR THE SECOND CIRCUIT

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DAVID LANE and MARY ANN LANE,

*Plaintiffs-Appellants,*

—against—

GENERAL MOTORS CORPORATION, A. B. CHANCE  
CO. and PITMAN MANUFACTURING CO., a division  
thereof (herein referred to as "Pitman"), and GOOD-  
YEAR TIRE & RUBBER COMPANY,

*Defendants-Appellees.*

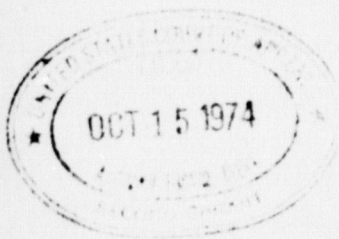
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On Appeal from the United States District Court  
for the Southern District of New York

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**BRIEF FOR PLAINTIFFS-APPELLANTS**

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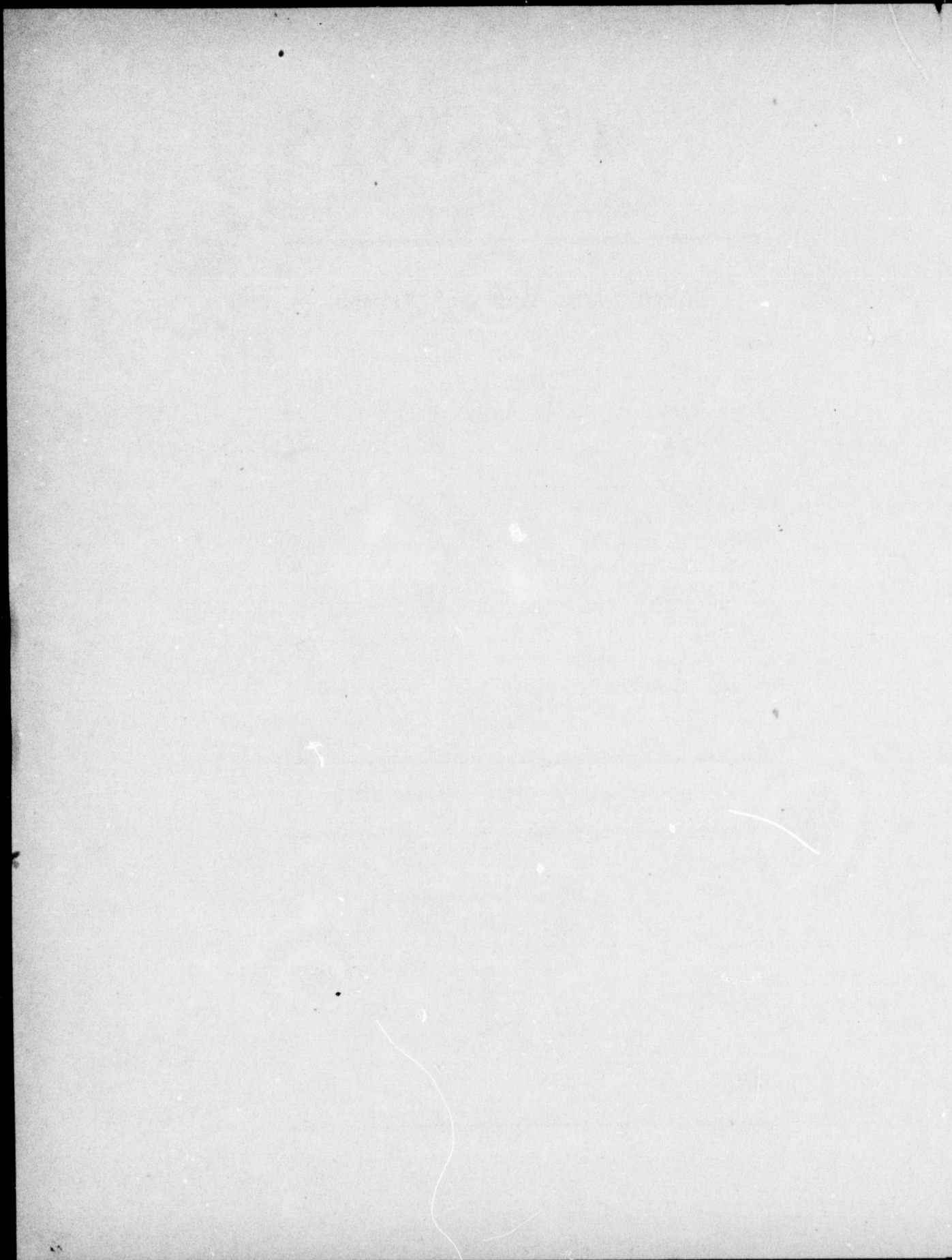
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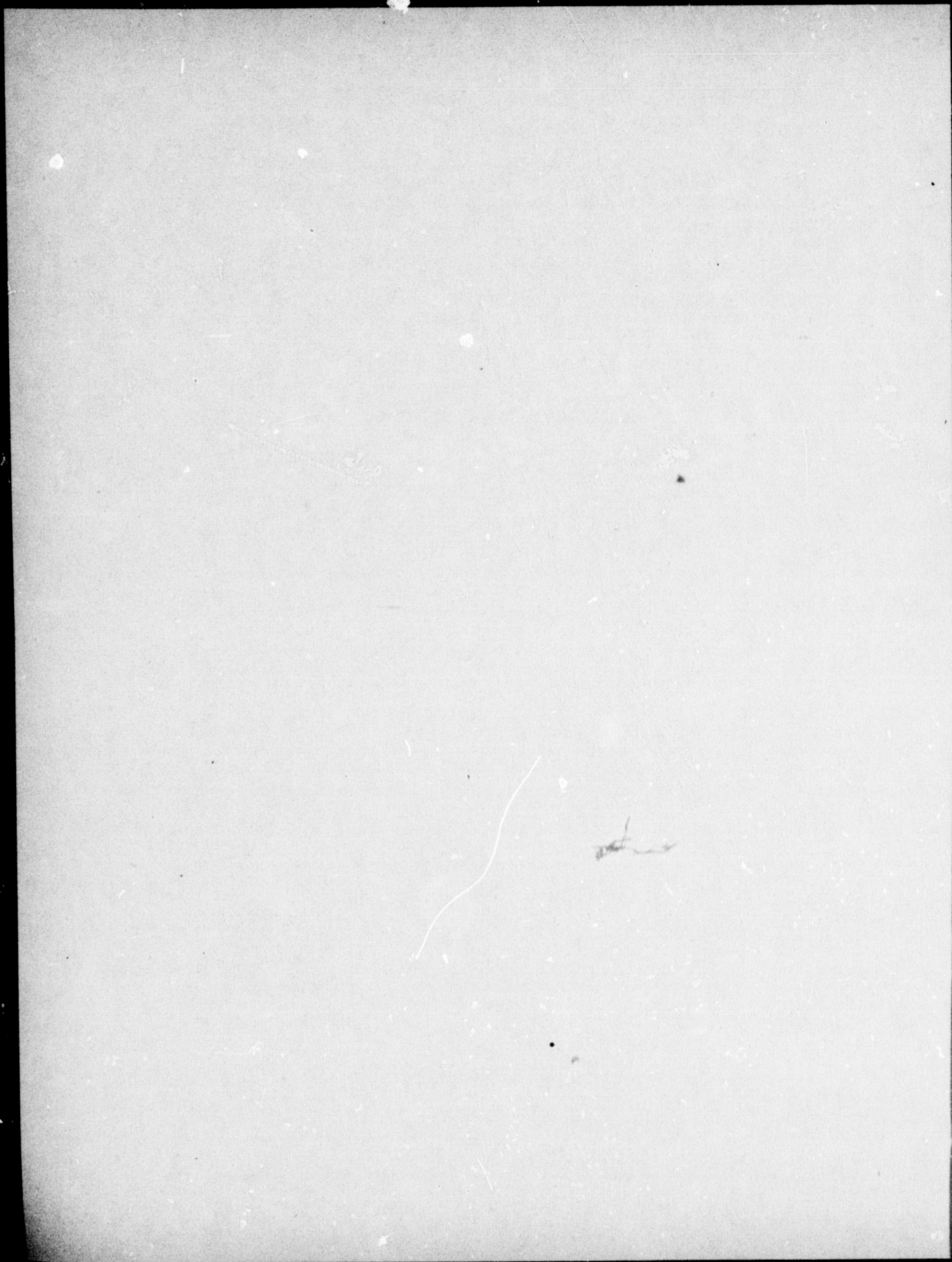
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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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DAVID LANE and MARY ANN LANE, :  
 :  
 Plaintiffs-Appellants, :  
 :  
 -against- : Docket No. 74-1818  
 :  
 GENERAL MOTORS CORPORATION, A. B. :  
 CHANCE CO. and PITMAN MANUFACTURING :  
 CO., a division thereof (herein :  
 referred to as "Pitman"), and :  
 GOODYEAR TIRE & RUBBER COMPANY, :  
 :  
 Defendants-Appellees. :  
 -----x

BRIEF FOR PLAINTIFFS-APPELLANTS

Statement Pursuant to Rule 28

Plaintiffs-appellants appeal from a judgment (per Weinfeld, D.J.) entered in the office of the Clerk of the United States District Court for the Southern District of New York on March 20, 1974 dismissing their complaint. The action sought recovery of damages for David Lane for personal injuries and for Mary Lane for loss of services.\* On this appeal, plaintiff-appellants limit themselves to that portion of the judgment dismissing their claims against

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\* Since Mary Ann Lane's claim is derivative, reference will hereafter be to plaintiff, in the singular.

defendant GMC for improper design of the door latch of the truck in which David Lane was injured. Plaintiff-appellants do not appeal from that portion of the judgment dismissing their claims against defendants GMC and Pitman Manufacturing Co. relating to the alleged instability of the truck in which David Lane was injured.\*

Question Presented

Did the District Court commit plain error in misstating plaintiff's theory of proof as to proximate cause, in misapplying the law of New Jersey as it relates to a manufacturer's strict liability for injuries caused by its failure to provide safety latches which are generally available in the industry, in improperly charging as to the defenses available to GMC, including the negligence of plaintiff, in failing to narrow and define the issues before the jury, and in incorrectly responding to a question from the jury on the primary fact issue relating to improper design?

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\* Prior to trial, plaintiff discontinued the action against defendant Goodyear although the caption has not been amended.

### Statement of the Case

Plaintiff David Lane was so severely injured on February 4, 1970 while employed as a lineman by the Jersey Central Power & Lighting Company as to be left a paraplegic. He was 29 years of age at the time. The circumstances of his accident are as follows:

At about 8 a.m. Lane left the Jersey Central yard in Farmingdale, New Jersey on a trip to the Sayreville power plant, approximately 25 miles away. He was traveling in a 7500 series GMC truck outfitted with a boom and derrick (sometimes referred to as a "polecat") and a rear cab installed by defendant Pitman Manufacturing Co. The truck was being driven that morning by a fellow worker, David Burlew. Next to Burlew in the seat of the front cab was Kenneth Leighton, a heavy equipment operator, and to Leighton's right was the plaintiff, sitting next to the right front door. Another three men sat in the rear Pitman cab. It was an icy winter morning, with some snow (T 46).\*

When the Jersey Central truck had traveled approximately 11-1/2 miles, and as it approached a changing light at the Syms Road intersection, going in a northerly

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\* Numbers in parentheses preceded by the letter T refer to pages in the Stenographic Transcript.



direction, Burlew started to apply the brakes. The truck was traveling approximately 20 to 25 miles per hour at the time and was in the right lane (T 48). As Burlew began to apply the brakes, the truck went into an immediate slide with the rear wheels heading towards the right (T 49). Burlew turned the steering wheel towards the right to try to maintain a straight line down the road (T 49). The truck then started sliding left across the lane. As it did so, it seemed to increase in speed (T 399) and began to turn in a counter-clockwise direction (T 49). On the left of the northbound lane was a median divider, approximately 10 feet wide with a curb variously described as 6 to 10 inches high (T 425, cf. T 1485). The front wheels of the truck hit the median curb and the truck went up onto the median; the truck continued in a counterclockwise swing and the right rear and then left rear wheels hit the curb (causing what Leighton later described as a bump, rather than a severe jar (T 425)). As the rear of the truck mounted the east side of the median, the front wheels fell off the west side of the median into the southbound lane of traffic. The truck then rolled over onto its right side (T 50).

As the truck had started to slide towards the median, both Leighton and plaintiff Lane had grabbed onto the front dashboard in an attempt to steady themselves (T 400, 906). As the truck hit the median, the right

door next to Lane opened (T 400) with a "loud popping metal against metal sound" (T 405, cf. 906, 907). As the door popped open, the truck began to lean to the right (T 400) probably because the right rear tire had deflated after impact with the curb (cf. T 1485). As the truck began to lean, Lane started to slide out of the cab, feet first (T 907). Leighton grabbed him by his outer jacket and held his torso in the cab (T 401). When the truck thereafter went over the median curb in the south-bound lane and rolled onto its right side, Lane's legs were dangling out the cab. The truck pinned Lane in a jack-knife position (T 908) causing paraplegia.

Plaintiff Lane was the only one of the six passengers in the Jersey Central truck to suffer serious injuries during the accident on February 4th. The others each suffered, at most, minor bruises resulting from jostling within the cab in which he was riding or from extricating himself from the cab after the truck had rolled on its side (cf. T 217). The door on the Pitman cab, which had a different latch than that in the front GMC cab, did not open even after the truck began to roll over (T 214). The right door on the front cab was definitely closed, however, before the truck hit the median (T 904-905), since it would have rattled if the latch were not fully closed (T 432).

Plaintiff was hospitalized for approximately 16 months after the accident (T 912). At the time of trial, counsel stipulated that the amount of the medical bills to date was \$91,172.70.

#### Summary of Argument

The charge of Judge Weinfeld was so fundamentally erroneous as it related to plaintiff's claim against GMC for improper design of the door latch of the truck in which plaintiff was injured, that, despite the failure of trial counsel to object to it, this Court has the power and obligation to order a new trial and avoid a miscarriage of justice. The plain and egregious errors in the charge included the misstatement of plaintiff's theory of the proof on the fundamental issue of fact before the jury: Whether the door of the truck would have opened during the accident in which plaintiff was injured if it had been secured by a proper safety latch. The charge also misapplied the law of New Jersey as it relates to the strict liability of a manufacturer for failure to install proper safety devices, and the defenses available to GMC including negligence of plaintiff as a basis for reducing damages in such actions. In addition, in view of the complex, extended and conflicting expert testimony on technical engineering questions related to door latch and truck design, accident reconstruction and damage appraisal,



the charge on the law of strict liability was so general and lacking in definition as necessarily to leave the jury in a state of uncertainty concerning the applicable law.

Finally, the verdict was fatally infected by the court's improper response to a question posed by the jury during its deliberations relating to a fundamental issue before it:--whether failure of GMC to use safety door latches in 1967 was a deviation from a standard of safety design then known and utilized in the industry.\* Although the uncontradicted proof was that such safety nonburst latches had been used on 1962 Ford trucks and 1963 Dodge and Chrysler trucks, Judge Weinfeld's response to the jury was that there was no testimony on this question.

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\* The precise question was: "Did anyone testify why safety nonburst locks were not used on trucks in 1967 (June 2, 1967)?" (T 2469)

## POINT I

Under the law of New Jersey GMC is liable for injuries resulting from its failure to install safety latches available in the industry.

### A. The law of New Jersey is applicable.

The parties in the court below were in agreement that in this diversity action the law of New Jersey was applicable, and this is clearly the law. Under Erie v. Tompkins, 304 U.S. 64 (1938), a federal court must apply the choice of law rules of the forum state. Klaxon Co. v. Stentor Mfg. Co., 313 U.S. 487 (1941). Under the law of New York, where the action was tried, the "grouping of contacts" theory is applied to tort actions having connection with foreign jurisdictions. Babcock v. Jackson, 12 N.Y.2d 473 (1963). The only contact with New York is that the plaintiff now resides here. The relevant contacts in this case are divided between New Jersey, Pennsylvania and Michigan. However, the only contact with Michigan and Pennsylvania is that part of the manufacturing process of the truck occurred in those states. The truck was contracted for and delivered to New Jersey which was the place of plaintiff's residence at the time of his injury, the place of his employment, and the situs of the accident. New Jersey law, therefore, governs this suit. Compare, Wheeler v. Standard Tool & Mfg. Co., 359 F. Supp.



298, aff'd, 497 F.2d 897 (2nd Cir. 1974).

B. Under New Jersey law, a manufacturer who fails to install in his truck safety latches available in the industry is liable to a passenger for injuries proximately resulting therefrom.

No New Jersey case relating to vehicle door latch design has been found, but New Jersey case law clearly requires that a manufacturer install safety devices, and those cases from states other than New Jersey which deal specifically with door latch design likewise support the view that it is the duty of a vehicle manufacturer to install safety nonburst latches.

New Jersey has been known as the leading jurisdiction in the country in the application of the strict liability standard to products liability cases since the decision in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). See generally, CCH Products Liability Reporter § 4509; Keeton, "Products Liability--Liability Without Fault and the Requirement of a Defect," 41 Texas L. Rev. 855, 857. In Henningsen, the New Jersey Supreme Court, in a suit for breach of an implied warranty of fitness brought against a manufacturer by a non-purchasing driver of a car, omitted the privity requirement, stating:

"Where the commodities sold are such that if defectively manufactured they will be dangerous

to life or limb, then society's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer. In that way the burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur." 161 A.2d at 81.

\* \* \*

"[W]e see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile." 161 A.2d at 83."

Following Henningsen, courts of other jurisdictions began to apply the concept of strict liability in tort to injuries caused by defective products. See, for example, Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897 (1963), and Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 433 (1963).

The New Jersey Supreme Court has expanded the doctrine of Henningsen to include a wide variety of sellers and consumers. Thus, in Santor v. A&M Karagheusian, Inc., 43 N.J. 52, 207 A.2d 305 (1965), the abrogation of the privity doctrine was extended to a suit against the manufacturer of a carpet, claiming breach of an implied warranty of fitness. Said the Court (207 A.2d at 313):

"Under the strict liability in tort doctrine, as in the case of express or implied warranty of fitness or merchantability, proof of the manufacturer's negligence . . . is not required. If the

article is defective, i.e., not reasonably fit for the ordinary purposes for which such articles are sold and used, and the defect arose out of the design or manufacture or while the article was in the control of the manufacturer, and it proximately causes injury or damage to the ultimate purchaser or reasonably expected consumer, liability exists."

In Cintrone v. Hertz Truck Leasing, 45 N.J. 434, 212 A.2d 769 (1965), a truck rental agency was held strictly liable for breach of an implied warranty of fitness in a suit claiming failure of the truck's brakes due to fatigue. It was not necessary, held the New Jersey Supreme Court, for the plaintiff to prove that the bailor could discover the defect through ordinary care. It was sufficient that the plaintiff prove that a defective condition existed which caused the accident.\*

In Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965), a tenant in a house purchased from defendant developer brought suit against the developer for injuries received by his child when the child was scalded by hot water from a water tap in the home. The tenant claimed the developer had failed to put a safety hot water mixer behind the tap, thereby proximately causing

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\* In Cintrone, it was sufficient for the plaintiff to prove that he had leased the vehicle from the defendant and that a collision occurred as a result of brake failure. The only defense apparently available was that the accident was caused through the negligent driving of the plaintiff. See 212 A.2d at 779.



such injuries. In reversing the dismissal of the plaintiff's suit, the New Jersey Supreme Court held that there was sufficient evidence to go to the jury and that the defendant could be held liable on strict liability principles for a defect in the design of the hot water distribution system which proximately caused plaintiff's injuries.\*

Closest on its facts to the instant case is Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972), which involved the manufacturer's duty to install a safety device. In that case, the plaintiff was injured while operating a punch press manufactured by the defendant. Plaintiff was required to place metal discs on the top of a die on the punch press. The machine would then hold the disc in place and plaintiff would depress a foot pedal activating the machine. At the time of the accident, plaintiff put a metal disc on top of the die which failed to go directly into its place. Plaintiff tried to correct the position of the disc and while doing so accidentally depressed the foot

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\* See also Martin v. Bengue, Inc., 25 N.J. 359, 136 A.2d 626 (1957), where the New Jersey Supreme Court reversed the dismissal of a complaint alleging that the defendant was liable for plaintiff's injuries caused when he lighted a cigarette and his chest, which was covered with Ben Gay, burst into flames. The court held it was for the jury to determine whether when the defendant's product Ben Gay was applied to the body it emitted vapors which when confined between the body and a pajama top would burn with a high intensity, and whether the intervening cause of the lighted match or cigarette was itself a foreseeable risk, and whether the plaintiff's burns would have been minor but for the ignition of the confined vapors.

pedal, activating the machine and bringing the punch down on his hand.

Plaintiff contended that the defendant was under a duty to equip the machine with a proper safety device. His expert testified that there were two types of protective devices known in the industry at the time of the sale of the punch which would keep the operator's hand from the machine while it was operated. One such device required both hands to depress buttons away from the press in order to activate the press; the other was a guard rail. Plaintiff's expert also testified that it was the custom of the trade for the ultimate purchaser, not the manufacturer, to install such safety devices. He testified, however, that this custom was improper because purchasers almost never provided such devices. He also testified that it was the custom generally to install pushbuttons on larger presses but not on ones like that in question although the danger to the operators' fingers was as great. Finally, plaintiff's expert testified that while guard rails which were supplied with the machine might have to be modified to suit the particular die or part used, no modification would be needed for a pushbutton device. The trial court dismissed the case at the end of plaintiff's proof.

The Supreme Court of New Jersey reversed, holding that plaintiff could recover either on negligence or strict liability grounds. The court rejected the provision in Restatement of Torts (Second), § 402(a) absolving a manufacturer of liability where he reasonably expects that a purchaser will provide necessary safety devices, on the ground that the "public interest in assuring that safety devices are installed demands more from the manufacturer . . . " (290 A.2d at 285).

The court went on:

"We hold that where there is an unreasonable risk of harm to the user of a machine which has no protective safety device, as here, the jury may infer that the machine was defective in design unless it finds that the incorporation by the manufacturer of a safety device would render the machine unusable for its intended purpose."  
290 A.2d at 285.

As for the custom of the trade not to install safety devices on such presses, the court held it was evidential but not conclusive on the question of the manufacturer's breach of duty. The court further held that in cases such as this contributory negligence would not be deemed a defense to either negligence or strict liability claims.

Bexiga and its companion case, Finnegan v. Havir Mfg. Corp., 60 N.J. 413, 290 A.2d 286 (1972), are on all fours with the instant case. Here also it is claimed that the failure of the manufacturer to install a safety device



caused injuries which would not otherwise have occurred.\*

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- \* Much has been written in recent years about the so-called "enhanced injury" or "second injury collision" case. In such a case, the claim is not that a defect in automobile design caused the original accident but rather that it enhanced the injuries which occurred during an accident. See generally, Sklaw, "'Second Collision' Liability: The Need for Uniformity," 4 Seton Hall L. Rev. 499; Annot. "Product Liability--Defect Enhancing Injury," 42 ALR3d 560. Most of the cases are collected in Roda, "Products Liability: The Enhanced Injury Case Revisited," 4 The Forum 643. The major issue in an enhanced injury case is whether the manufacturer should reasonably have foreseen that the original collision would result in increased injury to persons in the vehicle who were precipitated by the forces of that collision into a second collision within the vehicle. That issue is not involved in the instant case, for at trial below defendants' witnesses readily admitted that in the design of the Jersey Central Power & Lighting truck and latch system, GMC contemplated that the truck would be used on heavy terrain, and that such a truck would in the course of its use be driven over a large boulder, would experience twisting forces, such as occurred in a nine-inch ditch, and would be involved in at least minor collisions (Forrester, T 1449a-1450, 1533-1534; Morfopoulos, T 1643, 1644). Additionally, in the present case it can properly be said that there was only one accident, i.e., the door popping open, which was caused by the lack of a safety device. The case is, therefore, closer to the Bexiga case than to the second collision cases. In Bexiga, likewise, there was really only one accident, namely--the plaintiff's foot improperly hitting the pedal, which caused an injury to plaintiff's hand which would not have occurred had a safety device been installed.

Thus Bexiga and Finnegan make clear that under New Jersey law the failure of General Motors to install safety nonburst door latches in the Jersey Central truck imposed upon General Motors liability for David Lane's serious injuries provided only that those injuries be shown to have resulted proximately from that failure.

Furthermore, the conclusion that General Motors was under a duty to install safety nonburst latches is supported by cases from states other than New Jersey dealing specifically with door latches. The only reported cases found are McKinney v. Frodsham, 356 P.2d 100 (Wash. Sup. Ct. 1960); Bair v. American Motors Corp., 473 F.2d 740 (3d Cir. 1973); and Walker v. Int'l Harvester Co., 294 F. Supp. 1095 (W.D. Okl. 1969).

In McKinney, the Supreme Court of Washington sustained a jury verdict against a Volkswagen dealer, holding that there was sufficient evidence that the inability of the latch to hold under slight pressure would have been discovered by reasonable testing.

In Bair, plaintiff was injured when she was ejected from a 1966 Rambler after it was struck on the left fender by a vehicle travelling at 50-60 miles per hour. The theory of her case was that if the defendant had installed safety latches on the Rambler, as other manufacturers had



been doing for some time, the door would not have opened. Through her expert, plaintiff attempted to introduce three statistical surveys conducted by the Automotive Crash Injury Research of Cornell Aeronautical Laboratory, Inc. evaluating door lock effectiveness for pre-1956 automobiles, post-1955 automobiles and 1962-63 automobiles and comparing the frequency of door openings in 1967-68 cars with those manufactured earlier. These studies supported the witness's testimony that safety latches were more likely to prevent ejection and that the non-safety latch Rambler installed in 1966 fell below the current state of the art, 473 F.2d at 742. The trial judge refused to admit the studies and the plaintiff appealed from a jury verdict for defendant. The Third Circuit reversed and remanded for a new trial.

The Walker case, though it denied plaintiffs' motion for judgment n.o.v. is not to the contrary. The theory of plaintiffs in that case was that defendant manufacturer had improperly failed to use a safety latch causing the door of its truck to open with only slight impact. However, defendant offered proof that other truck manufacturers were using the same latch at the time; that the plaintiffs' truck was struck near the right front door by a car going approximately 40 miles per hour, and that any

latch would have opened under similar circumstances. In addition, during the course of the trial it was shown that the plaintiffs' witness, the driver of the car, had earlier stated that plaintiffs' ward, the injured passenger, had been riding with her hand on the door handle and this was probably how the door had opened.

#### POINT II

The charge as to the door latch system was fundamentally erroneous.

A. The absence of objection to the charge does not preclude review.

That plaintiff's trial counsel did not object to the charge is not an absolute bar to consideration by this Court of the errors contained therein. Under the "fundamental error" rule error in a charge will be reviewed, notwithstanding the absence of objection, where it is apparent from the whole record that a miscarriage of justice may otherwise occur. Ferrara v. Sheraton McAlpin Corp., 311 F.2d 294, 297 (2d Cir. 1962); Blier v. United States Lines Co., 286 F.2d 920, 922 (2d Cir. 1961), cert. denied, 368 U.S. 836; Shokuan Shimabaukuro v. Higeyoshi Nagayama, 140 F.2d 13, 15 (D.C. Cir. 1944), cert. denied, 322 U.S. 755; Mazer v. Lipschutz, 327 F.2d 42, 52 (3d Cir.

1964); A-F Corporation v. Caporaletti, 240 F.2d 53, 54 (D.C. Cir. 1957); McNello v. John B. Kelly, Inc., 283 F.2d 96, 102 (3rd Cir. 1960). See also Hormel v. Helvering, 312 U.S. 552, 556-557 (1941), and Sibbach v. Wilson & Co., 312 U.S. 1, 16 (1941).

Ferrara, supra, a decision of this Court, is a good illustration of the concept of fundamental error. Plaintiff in that case had fallen in the bathtub in defendant's hotel. The judge charged the jury that it could "infer from the testimony, from the facts as you heard them, whether or not the hotel had what we know in the law as constructive notice of this condition." Though no objection was taken, this Court held that the failure of the judge to explain the technical concept of constructive notice, one not familiar or understood by a typical layman selected for jury duty, had deprived the jury of the minimum guidelines necessary for responsible decision and constituted reversible error.

Not only is failure to explain a technical legal concept within the fundamental error doctrine, but also is the failure to relate the evidence in the case to the particular legal standard involved. The McNello case, supra, was a situation of the latter type. That



case involved an action by a carpenter against a construction company responsible for building a brick structure which the carpenter had been using to aid him in crossing from one compartment to another and which collapsed, causing the carpenter injuries. The trial court charged that negligence was "the want of due and proper care." In remanding for a new trial, despite the lack of objection to the charge, the Third Circuit held (283 F.2d at pp. 101-102):

"Although [the jury] were also told that they must consider what an ordinary prudent man would do under the circumstances of the case, the court at no time pointed out what the relevant circumstances in this case were. Moreover, an examination of the court's charge reveals that even this wholly abstract instruction was not given in a clear and understandable form. Furthermore, the court nowhere attempted to relate the evidence to the law and thus left entirely to the jury the task of particularizing the legal standard in working out the alternatives possible under the facts. Under such circumstances we cannot help but conclude that the court's charge was totally inadequate to provide even the barest legal guideposts to aid the jury in rationally reaching a decision." (Emphasis supplied.)

The importance of relating the evidence to the principles of law charged has likewise been the basis of decision in a number of state cases, Green v. Downs, 27 N.Y.2d 205 (1970); Friedman v. Medtronics, Inc., 42 A.D.2d 185 (2d Dep't 1973) which while not binding on this court are persuasive on the point. Thus, in the Green case reversal was based upon

the lack of specificity of the charge and the court's

" . . . failure to discuss the evidence and to relate it to the principles of law that were charged, and to apply to each party's version the pertinent statutory and decisional law. We deem it essential that a charge 'incorporate the factual contentions of the parties in respect to legal principles charged.' [Citations omitted.] The trial court's instructions 'should state the law as applicable to the particular facts in issue in the case at bar, which the evidence in the case seem to prove; mere abstract propositions of law applicable to any case, or mere statements of law in general terms, even though correct, should not be given unless they are made applicable to the issues in the case at bar. . . .'" (27 N.Y.2d at p. 208).

As is developed in the remaining subdivisions of this point, fair consideration of the totality of the errors in the charge, coming after a long trial devoted to complex and highly technical presentations by all sides, requires that plaintiff, who has been gravely and permanently injured, be granted a new trial.

- B. The trial judge failed adequately to review the expert testimony for the jury and by misstating the theory of plaintiff's proof as to proximate cause charged plaintiff out of court.

In his charge, Judge Weinfeld summarized the opposing conclusions of the experts as to the quantum of forces at work on the truck as the door opened (T 2424-2425). He failed to charge, however, as to the opposing

theories advanced by them concerning the damage to the truck's chassis and its relation in time to the opening of the door, which was the crucial evidentiary question before the jury.

Most of the 2400 pages of the trial transcript were devoted to expert testimony concerning complex engineering issues raised by the plaintiff's claim of defective design. In order that the Court may appreciate the complexity of the issues before the jury and the corresponding burden upon the trial judge clearly and narrowly to define the evidentiary and legal issues, it is necessary to summarize the expert testimony as it related to the door latch. It will be shown that although the expert testimony covered a wide range of technical matters, any one of which could have consumed the attention of the jury, in fact only one real issue was presented concerning the latch. The failure of the court to focus the attention of the jury upon this issue deprived them of any meaningful guidance and deprived the plaintiff of a proper verdict.

The plaintiff's first engineering expert was I. Robert Ehrlich, Chief of the Transportation Research Group of the Davidson Laboratory at Stevens Institute of



Technology and Professor of Mechanical Engineering (T 603). Dr. Ehrlich physically inspected the Jersey Central truck on September 25, 1970 at the behest of the plaintiff's attorney (T 611). He found no damage to the door hinge or to the door itself other than sheet metal damage (T 671, 699). Dr. Ehrlich caused the damaged door of the truck to be removed to his laboratory where he cut out the latch and studied it under laboratory conditions. The latch, Dr. Ehrlich testified, had a basic defect in that the parts which are intended to keep the latch engaged are in fact separated (T 676-677). As a result, if either the door, the frame or the hinges are distorted, the door would open up by itself (T 673). Such distortion, which need be only 3/8 of an inch (T 773), could occur while such a truck was mounting a curb (T 773) or during a roll over (T 673). In comparison, Dr. Ehrlich offered a so-called non-burst or safety latch which had been taken from a 1967 Oldsmobile (T 684). This latch, which was accepted into evidence for purposes of demonstration (T 686), encapsulated the striker so that it could not come apart without a rending of its steel parts (T 676). Dr. Ehrlich testified that safety latches had been introduced in about 1956 (T 641) but he was not permitted to testify that the latch was used commonly prior to 1966 (T 676-677, 686, 688).

As for the accident in question, Dr. Ehrlich testified that his examination of the Jersey Central Power truck

revealed that the body damage was in fact very slight. He discovered nothing to suggest a force strong enough to render the metal parts of a safety latch (T 689-690). In conclusion, Dr. Ehrlich testified that if the truck had been equipped with safety latches, the right side door of the cab would not have opened and Mr. Lane would not have been seriously injured (T 689-690).\*

The plaintiff next called Derwin Severy, formerly Director of Automotive Collision Research at UCLA (T 923). Mr. Severy had himself conducted several thousand collision impact tests under controlled conditions (T 922) and had personally investigated another six thousand accidents (T 923). Mr. Severy had published over seventy papers in the field of automotive collision research, principally in the Journal of the Society of Automotive Engineers (T 926). He was Vice Chairman of the National Motor Vehicle Safety Advisory Council for three years, having been appointed by the late President Johnson (T 929-930), and was Chairman of its Research Committee. Mr. Severy had devoted particular attention to the development of automobile door latch standards while working on a committee for the Society of

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\* Dr. Ehrlich also considered the possibility that Mr. Lane's knee had engaged the interior door handle causing it to open--a possibility later suggested by GMC's witness Forrester. Dr. Ehrlich rejected this hypothesis because Mr. Lane was undoubtedly thrown up and out by the movement of the truck whereas to be opened the door handle had to be pushed in the other direction (T 745). Plaintiff's other expert, Dr. Severy, agreed (T 997).



Automotive Engineers (hereinafter "SAE") (T 927) which work he had begun in 1956 (T 964).

Severy testified that the latch in question was known as the old-style latch which did not incorporate the anti-burst feature (T 964). Because of the design of the latch, he testified, a normal jolt could cause it to open (T 968). This was because of two features of the latch which even absent a direct external force tended to force the latch open through the effect of inertia on the weight of various components of the latch itself (T 967). These features, described at T 967-969, augmented the inertial forces into longitudinal and vertical displacements. As a result, the door tended to be self-opening, since the placement of the component parts tended to force them apart rather than together.

In addition to the tendency of the latch to open solely through the effect of inertia on its internal parts, Severy testified that the latch lacked a vertical retention plate. His examination of the latch and door disclosed that the vertical alignment was about normal even after the accident. There was, he testified, no evidence of strain on the shroud or latch cover, such as would occur where high torsional forces built up in a two-car collision. Since the door in question apparently opened without having to

strain the shroud, a vertical retention plate which put pressure on the shroud would have held the door closed during the nominal impact the truck experienced (T 970).

This problem of the self-opening door was discovered in the late 1950's, the witness continued. This led the SAE to recommend a latch design which would avoid that particular problem (T 967). The safety or non-burst latch which prevents longitudinal as well as vertical movement meets this problem (T 975). Although the witness was not permitted to testify when anti-burst latches were first used in cars (T 971), he did state they were first developed around 1954 (T 972). The witness identified plaintiff's Exhibit 76 as a safety latch used in a 1964 Chevelle and a 1965 Corvair and developed by GMC (T 975). Severy further testified, of his own personal knowledge, that anti-burst or safety latches were used in 1962 Ford trucks and 1963 Dodge and Chrysler trucks (T 972-1061). There was no difference in the principle upon which these locks worked in trucks or cars (T 971, 982) and indeed there was a greater need for them in trucks, the witness testified (T 960). This was because as the size of the door increased, so too the potential for longitudinal torsional changes in the door increased. A stronger latch was, therefore, needed on a larger door.

As for the witness's evaluation of the forces at work during the accident in which Mr. Lane was injured, he testified that evidence of the twisting which caused the latch on the Jersey Central Power truck to ~~open~~ was observable on the striker but not on the door or the frame (T 1066-1067, 1081). (Such a twisting would usually cause elastic changes in the door not likely to lead to permanent deformation (T 1078)). The indentation and paint-scraping on the striker was evidence of movement between the latch and striker that preceded the opening of the door (1068-1070). The popping noise testified to by the occupants of the truck was also consistent with the forced unlatching of the door (T 998). There was no reason to believe that an occupant would have opened the door accidentally--if the handle had been pushed forward it would have only locked (T 997).

Further, Severy testified that although any latch might fail if impact forces were high enough, relatively nominal impact forces are associated with this type of accident (T 982). From his experimental work, Severy calculated the lateral drag coefficient which would normally attend a skid on an icy surface similar to that which occurred on the morning of February 4. That lateral drag was accompanied by a jolt of the rear wheels against the curb and was augmented by the



plowing effect caused by the rear tire deflating and the rim flange being exposed (T 992-993). During this period the truck would be de-accelerating or dissipating its energy, in a lateral direction, and would tend to throw the occupants towards the right and pop open the door towards the right as well. The lateral forces on the latch would have been principally generated while the truck was moving counter-clockwise, the rear tires hitting the curb and the right rear tire beginning to deflate, and it is in that period that the door popped open (T 994-998). This action of the rear wheels hitting the curb and the rear tire deflating also was responsible for the overturning of the truck (T 1257).

Although Severy testified that lateral forces were generated on the latch as the rear tires obliquely struck the curb, and there was evidence that those forces had caused the door to pop open, nevertheless his calculation of the forces at work showed they were minimal when compared with the forces which the average car experiences during a crash (T 1137). This was substantiated by the lack of any deformation of the latch cover, the door or the frame.

Severy also testified that the major damage to the rails of the chassis and the lesser damage to the superstructure of the truck was occasioned not by the lateral

forces exerted as the rear wheels hit the curb, but by the inertial forces exerted as the heavy superstructure weighing approximately 25,000 pounds with an elevated boom approximately 8 feet above the rear axle (cf. T 1716) slammed down as the truck turned over. The leverage exerted by the boom and the superstructure as the truck rolled over twisted the frame into the condition in which it was found (T 998). This major damage to the frame, however, occurred after the door popped open (T 998) and at the same time as the truck fell on Mr. Lane (T 996). Mr. Lane would not have received his major injuries had the door stayed closed when the rear wheels hit the curb (T. 1194-1196).

The defendant GMC offered as its first expert witness Dewane Forrester, Assistant Chief of Truck Engineering for GMC. He testified that the 7500 Series truck in which David Lane was injured was first produced in 1960 (T 1528). The latch used in the truck was in use before 1960, however (T 1528), probably since at least 1956 (T 1529). The particular truck David Lane was riding in on the morning of February 4, 1970, was built at the end of 1966 or early 1967 (1445). Although some improvements were made to the 1960 prototype prior to 1966 (T 1446, 1507), none were made to the latch system. However, in strenuous testing procedures GMC had received no reports that the latch was deficient (T 1452).

The testing procedures, which Mr. Forrester described at some length, included runs through a nine-inch twist ditch (T 1449A-1450) and a Belgian block course consisting of cobblestones laid at varying heights in the neighborhood of three or four inches to provide an undulating surface (T 1449). This type of testing was dictated by the company's understanding that such a vehicle might run over a large boulder or substantial curb (T 1533-1534), might encounter forces such as generated by certain collisions (1533) and must withstand torsional forces on the frame (T 1464).\*

Mr. Forrester also testified that when the latch in issue was designed it provided the best possible locking system known to the art at that time (T 1507-1508). He admitted the latch was not encapsulated (T 1509), that encapsulated latches were being used prior to 1965 by GMC in passenger cars (T 1512), and were an improvement in

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\* As to whether the company contemplated in the design of its truck forces such as those generated in a skid similar to that which occurred on February 4, Mr. Forrester testified: "Now I think you're getting to the point where we can't contemplate the forces that are going to be generated and account for them in the design of the vehicle." (T 1534).



safety design.\* Nevertheless, Mr. Forrester testified that the latch on the 7500 series was reasonably fit for the purpose intended (T 1481) and not defectively designed because it was made of high quality parts put together in a high quality manner and had demonstrated good service.

Mr. Forrester also testified concerning his opinion as to why the door opened during the skid. Although he concluded the door was either jostled open by Mr. Lane's leg, an admittedly speculative conclusion (T 1537), or was forced open by the extremely high forces exerted during the skid (T 1488-1490),\*\* Mr. Forrester had adopted these alternative theories because the latch system had been fully tested (T 1535). Moreover, there was a half-

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\* "Q Can you tell me, sir, of your knowledge as an engineer and from your knowledge and experience, prior to the development of the anti-burst latch or the safety type latch used in automobiles, was there a problem generally known to engineers in the automotive industry of doors popping open and ejecting or partially ejecting passengers with a high degree of frequency with relatively nominal forces exerted in collisions with fixed objects or in mounting of curbs or ditches or with roll-overs?

\* \* \*

A The answer, I guess, would be: Under certain circumstances of design in passenger cars, this latch did assist in keeping the door closed, if that is important to us in this case." (T 1513-1514).

\*\* The latter opinion, Mr. Forrester testified, was more consistent with the loud popping noise heard as the door opened. (T 1543-1544)

inch engagement of the striker plate and lock and Mr. Forrester could not agree with Mr. Severy that a nominal force could distort the door to such an extent (T 1482). The damage to the chassis frame was further evidence of the high forces present during the accident (T 1490) and there was a possibility such forces could affect the cab (T 1491) even though it was designed to be insulated from torsional inputs (T 1483, cf. 1462). In conclusion, Mr. Forrester testified that he believed most any other latch would open under similar circumstances (T 1488).\*

If only nominal forces were sufficient to open the door, he would concede that it was improperly designed (T 1531-1532).

GMC's second expert witness was Vassilis Morfopoulos. Dr. Morfopoulos was technical director of the American Standard Testing Bureau (T 1623), a member of the SAE (T 1620), and an expert on the applied mechanics of materials and materials engineering (T 1626). He had studied the effect on truck bodies of different road conditions, including a study for the New York City Fire Department of the effect of cornering and curb mounting on fire engines (T 1626-1627). To prepare for his testimony,

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\* Compare Mr. Forrester's testimony at 1547: "That kinetic energy was manifested and manifested itself in twisting of the vehicle and the twist of the vehicle enters into the structures on the vehicles are such (sic) that the GMC cab, in my opinion, does not make too much difference what the lock is (sic), it could have failed. . . ."

Dr. Morfopoulos had obtained a 7500 model GMC truck chassis, similar to the one in which Lane was riding (T 1630), and had subjected it to various static and dynamic tests. Those tests were designed to measure the forces on the latch and chassis which were experienced as the truck simulated "severe normal loads" including going into a one-foot pothole or riding up on a one-foot curb at 25 miles per hour (T 1643-1644). The experiment demonstrated, Morfopoulos testified, that the maximum force on the chassis rails (tested without superstructure (T 1646) when the truck was mounting a twelve-inch curb under normal movement at 25 miles an hour (T 1644)) was approximately eight thousand pounds, and the maximum force on the door at that time was approximately two thousand pounds (T 1651-1652).<sup>\*</sup> Such forces, he testified, were insufficient to deform the rails, and were insignificant insofar as they affected the door (T 1652). This was substantiated by his former tests on fire engines which showed that the force on their door latches as the engine

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\* The present federal standard for automobile and truck door latches requires that they not separate when a longitudinal load of 2500 pounds or a transverse load of 2000 pounds is applied. C.F.R. Title 49 § 571.206 (S4. 1.1.1.; S4. 1.1.2).



mounted the curb was "nil" (T 1709). His conclusions, as they applied to the accident, were as follows: The mounting of the curb would not normally affect the door because the design of the front cab reduced the torsion which would usually be experienced; hence, nominal forces on the chassis rails would not pop open the door, nor would it twist the rails (T 1634-1639); since the frame or chassis rails were in fact discovered to be twisted out of shape after the accident, this had to be the result of more than nominal forces (T 1639-1640); the gouging of the curb and the failure of the rear tire suggested that these forces were experienced when the rear tires hit the curb (T 1641); in Dr. Morfopoulos's opinion, the greatest forces were exerted on impact with the curb and not during the tipping over of the polecat (T 1717-1718).

The experimental findings of Morfopoulos that only nominal forces are exerted on the door and chassis when a 7500 series truck mounts a 12-inch curb at 25 miles per hour strongly support Severey's conclusions that a safety latch would have held when the Jersey Central truck hit the curb and that the main damage to the chassis occurred when the truck rolled over. Moreover, Morfopoulos's theory of when the damage to the chassis occurred fails to explain

the lack of permanent damage to the door, frame or latch cover. The sole factual basis for his theory is the damage to the curb consequent upon the tire blowout. As for the witness's dismissal of the damage caused by the polecat slamdown, his testimony (T 1717-1718) is at best oblique.

On cross-examination, Dr. Morfopoulos was questioned as to why the latch on the rear man-cab did not open as did the latch on the front cab, if the forces were so great when the truck hit the curb. The witness admitted that under his theory gigantic torsional forces would also affect the trailer or superstructure at the moment of impact since the trailer would be whipped around like the last man on an ice-skating chain (T 1668, 1672), and that this was substantiated by the bending of the very heavy hook attaching the trailer to the truck (T 1656). Nevertheless, as far as the latch on the rear cab was concerned, "slightly different engineering considerations" were present (T 1713). Torsion was greatest on the ends of the chassis frame which would tend to minimize the torsion felt in the center of the vehicle (T 1714). On the the other hand, the witness did not deny that since the rear cab was attached to the frame while the front cab was insulated from it, the rear cab

would be subject as a result to greater forces on that account (T 1714-1715).

At the conclusion of his testimony, the court inquired of the witness as to whether the substance of his testimony was that 580,000 foot pounds of kinetic energy (a factor of the weight of the truck and its speed), was released or dissipated when the truck hit the median curb\* and that as a result the latch was affected and became disengaged. In reply, Dr. Morfopoulos stated that the latch was not affected at all (the witness did not correct the court's erroneous remark concerning kinetic energy) but "the entire vehicle was twisted out of form permanently" [there was no evidence to this effect] and the cab was physically stretched [there was no evidence to this effect either]. (T 1728-1729). The court then propounded the following questions:

"The Court: Also, is it your opinion that this would have occurred no matter what kind of latch system--

The Witness: Absolutely.

The Court: -- was in effect or installed on this truck?

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\* This is an obvious misunderstanding by the court. Kinetic energy is not dissipated until a vehicle comes to rest. Before that happened to the Jersey Central truck, it had hit the curb with each of its four wheels, had traveled more than ten feet across the median, digging a deep furrow, had fallen into the opposite roadway, and had turned over. Compare the testimony of Severy at T 992 to 994.



The Witness: The latch would be just a bystander.

The Court: You say it doesn't make any difference what type of lock was on it?

The Witness: No sir." (T 1729).

In summary, the plaintiff's proof that his aggravated injuries were proximately caused by the defective design of the GMC door latch was presented through his expert witnesses, Ehrlich and Severy. Ehrlich, who had examined the truck and tested the latch, testified that because of the design of the latch, an elastic or nonpermanent distortion of only 3/8 of an inch in either the hinges, the door or the frame could cause the door to open of itself. Although Ehrlich did not express an opinion as to when, in fact, the door opened, he did state that such a 3/8 inch distortion could occur either while the truck was mounting the curb or in a rollover (T 673, 773). Ehrlich also testified that from his physical examination of the truck he determined that the damage was slight and there was no evidence of the exertion of a force which would have been great enough to rend the steel parts of an encapsulated latch (T 689-690). He concluded that had the truck been equipped with a nonburst latch, the door would not have opened, and the plaintiff would not have been seriously injured (T 689-690).

Severy, the accident reconstruction expert, also testified as to the defective design of the latch, in particular, that because of the placement of the inner parts the latch tended to open, rather than close, even if no direct external force was applied (T 967-969). As a result, even a normal jolt or any other nominal force could open the latch (T 968). His principal testimony, however, focused on when the door opened and, in particular, whether before or during the major damage to the chassis rails and superstructure. Since Severy admitted that any latch, including a nonburst latch, would open if subject to sufficient force (T 982), and since the substance of the defense presented by GMC's two experts was that any latch would have opened under similar torsional forces (T 1488, 1729-1730), the timing of the damage to the chassis rails in relation to the opening of the door became the fundamental issue in dispute -- indeed, probably the only issue. If the severe torsional forces which had twisted the steel chassis rails occurred at the time the rear wheels hit the median and the door popped open, the jury could credit the testimony of defendant's witnesses that any latch would have opened under such torsional pressure. On the other hand, if the chassis rails were twisted out of shape only after the truck had rolled over, and the polecat

slammed down, as Severy testified (T 998), the jury could credit his testimony that at the time the rear wheels hit the median and the door popped open, only nominal forces were operating on the latch and a safety latch would have held in similar circumstances.

It is clear, then, that in order for plaintiff to sustain his case, he had to convince the jury that the door opened when the rear wheels hit the median and that the major damage to the chassis rails and the superstructure occurred thereafter, when the truck rolled over. The judge's charge, however, set forth a theory for the plaintiff fundamentally different from this:

" . . . As I have already mentioned, plaintiff here contends that even if he should fail to sustain the claim of instability against either or both defendants, nonetheless, he is entitled to recover against General Motors because, as he claims, the latch failed to hold during the rollover.

He does not contend there was a flaw or defect in any of the physical parts of the latching mechanism or its manufacture.

What he does contend is that the system was so designed that in the event of an accident it was not reasonably fit to avoid increased injuries - that the failure of the latch to remain in its locked position during the turnover of the vehicle caused him to sustain injuries he would not otherwise have received or that his injuries would not have been as severe." (T 2431) (Emphasis added.)



'This misstatement of the plaintiff's case was no mere irregularity. It went to the heart of the only real issue of fact before the jury: Was the failure to equip the truck door with a safety latch the proximate cause of plaintiff's injuries? The plaintiff was thus stripped of the only theory which could support his claim.

C. The judge's charge as to "defect" and "unreasonable risk of injury" was a misstatement of the law of New Jersey and was highly prejudicial to plaintiff.

Judge Weinfeld charged the jury that the plaintiff was not seeking to recover for negligence but on a claim of strict products liability (T 2415). Under such a claim, he charged, where a manufacturer markets a product which he manufactures, designs or assembles, and which is

"defective, that is, one not reasonably fit for its intended purpose or use, and such defect is a proximate cause of damage or injury to a person, [he] is held liable for the resulting damage." (T 2415).

This charge, relating "defect" to the warranty standard of "fitness for intended use," \* was repeated elsewhere throughout the charge (cf., T 2423), sometimes being interpolated to "reasonably safe for its intended purpose." (T 2428, 2429, and 2431.) However, the charge as to defect contained no

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\* The New Jersey Supreme Court has expressly disavowed the use of warranty terminology in strict liability cases. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314, 325 (1965).

explanation of this "highly technical concept" and left "the applicable rule of law in a state of uncertainty." Ferrara v. Sheraton McAlpin Corp., supra, 311 F.2d at 297.

The term "defect" conjures up images relating to improper manufacture, rather than improper design, and most "defect" product liability cases are in that genre, requiring proof of negligence in manufacturing. See, Keeton, "Manufacturer's Liability: The Meaning of 'Defect' in the Manufacture and Design of Products," 20 Syracuse L. Rev. 559, 562. The examples of "defective" conditions set forth in the Restatement of Torts (Second) § 402(a), Comment G, are also of this class. The use of the term in a case charging improper design is therefore inherently confusing, and the confusion was worsened by the special verdict sheet given to the jury, which was ambiguously phrased, required them to find:

"2. With respect to plaintiff's claim based upon the alleged defect of the latch mechanism, do you find plaintiff has sustained his burden of proof as to the defendant General Motors?" (T 2448) (Emphasis added.)

More importantly, this charge utterly fails to set forth the elements which the jury must consider in determining whether the manufacturer is to be held

liable. Obviously, a design case presents distinct issues for the jury from an improper manufacturing case or an unwholesome product one. See, generally, Traynor, "The Ways and Means of Meanings of Defective Products in Strict Liability," 32 Tenn. L.Rev. 363. Whereas the inquiry in an improper manufacturing case, the typical "defect" case, is whether the product as produced contained an unintended condition, Keeton, supra, 20 Syracuse L. Rev. 559, 562, in a design case the condition of the product is clearly as it was intended. The inquiry in such a case turns to whether the manufacturer has utilized the skill of an expert in the business and used the techniques and devices available to practical men in the trade. Harper and James, The Law of Torts, 1541 (1956). An automobile manufacturer will be held to a

"reasonable duty of care in the design of its vehicle consonant with the state of the art to minimize the effect of accidents."  
Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968).

Accord, Bair v. American Motors Corp., 473 F.2d 740, 742 (3rd Cir. 1973), discussed above at pages 16-17; Dreisenstock v. Volkswagenwerk A.G., 489 F.2d 1066, 1072 (4th Cir. 1974); Hoppe v. Midwest Conveyor Company, Inc., 485 F.2d 1196, 1202 (8th Cir. 1973); Dyson v. General Motors Corp., 298 F.



Supp. 1064, 1073 (E.D. Pa. 1969); see also, Blohm v. Cardwell, 380 F.2d 341, 342-343 (10th Cir. 1067). A manufacturer may even be held to a higher standard than the state of the art if design capabilities and economic practicalities so dictate, Note, "Tort--Strict Liability--Automobile Manufacturer Liable for Defective Design that Enhanced Injury After Initial Accident," 24 Vand. L. Rev. 862, 868, and in such a case the jury may be required to consider the relative costs in adopting other designs, Hoppe v. Midwest Conveyor Company, supra, at 1202, the overall cost of the vehicle and the relation thereto of the safety feature, Dreisenstock v. Volkswagen, supra, at 1066, and compare Santor v. A&M Karagheusian, Inc., 43 N.J. 52, 207 A.2d 305, 313, the "potential" available to the designer at the time, Balido v. Improved Machinery, Inc., 105 Cal. Rptr. 890, 895, 29 Cal. App. 3d 633 (1973) and generally to balance "the likelihood of harm, and the gravity of the harm if it happens, against the burden of the precaution which would be effective to avoid the harm." Harper and James, supra, at 1542. Additionally, in a strict liability jurisdiction (such as New Jersey), a manufacturer may be held to a standard of expertise found to be prevalent at the time of the trial even if due care would not have

avoided the accident at the time of marketing, Keeton, supra, 20 Syracuse L. Rev. 559, 568. This is consistent with the public policy set forth in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, and restated time and again since then, that

"When a manufacturer presents his products for sale to the public he accompanies them with an implied representation that they are reasonably fit for the intended use, and he is subject to an enterprise liability, the purpose of which is to insure that the cost of injury or damage resulting from defective products is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves." Santor v. A&M Karagheusian, Inc., 43 N.J. 52 at p. 65, 207 A.2d 305 at p. 312." Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314, 325 (1965).

Unfortunately, the trial court's repeated use of the terms "defect" and "intended use" in giving its charge to the jury failed to convey the above concepts. The outline of a proper charge, with respect to a defect in design, suggested by Professor Harvey Sklaw in his article on "'Second Collison' Liability: The Need for Uniformity," 4 Seton Hall L. Rev. 499, 529-530, as an instruction which reaches the heart of the controversy, follows:

"The plaintiff has endeavored to prove by expert testimony that the 1961 Chevrolet station wagon produced and sold by the defendant deviated in design from the standards generally applied to passenger cars of like kind in that the defendant designed and built its vehicle with an X frame though the norm in use

at the time of manufacture was an A frame. If you are convinced by the testimony that this design did, in fact, constitute a deviation from the norm, you are instructed to find that this deviation did in fact constitute a defect unless you have been convinced by the testimony of defendant's experts that this deviation did not add to the hazard encountered by the plaintiff in this case.

Alternatively, the plaintiff has produced testimony that designing and producing this station wagon with an X frame constituted a defect in design in itself. That is: regardless of comparison with any other passenger cars, this design is unacceptable in regard to the hazard it produces to the user of the product. Defendant, of course, has produced testimony to the contrary. You are instructed to weigh all the evidence and testimony presented to you in this regard and to decide whether or not you are convinced that this design, standing on its own merits, does in fact constitute a defect."

The lack of specificity or definition in Judge Weinfeld's use of the terms "defect" and "intended use" was only exacerbated by his subsequent charge that GMC was under a duty to market a product designed to avoid

"unreasonable risk of injury in the event of an accident" (T 2431)

and one

reasonably adequate to avoid increased risk of injury" (T 2432).

The court offered no definition of the terms "increased risk of injury" or "unreasonable risk of injury".

Yet the terms are hardly obvious or "understood by the



typical layman selected for jury duty." Ferrara, supra, 311 F.2d at 297. From what base or standard should the jury calculate whether a risk of injury had been "increased"? Must it be increased over the risk presented by other 7500 GMC truck latches? Other truck latches in general? Car latches? Latches known to the state of the art? From what vantage should the jury consider whether the risk was "unreasonable"? Should it be "the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics" (Restatement of Torts (Second) § 402(a), Comment I)? The reasonable "maker who had full knowledge of all the risks and dangers" (Keeton, supra, 20 Syracuse L. Rev. at 568)? The reasonable man after weighing the economic burden on the manufacturer against the possibility and gravity of harm to the consumer (Note, "Torts--Strict Liability," 24 Vand. L. Rev. 862, 868)? Or perhaps the inquiry should be the expectations of the injured plaintiff, compare Cronin v. J. B. E. Olson Corp., 104 Cal. Rptr. 433, 501 P.2d 1153 (1972), and Glass v. Ford Motor Co., 123 N.J. Super. 599, 304 A.2d 562 (Law Div. 1973). None of these essential questions were addressed by the judge's charge and the jury was without any meaningful guidelines as it deliberated on the complex technical issues before it.

The charge as to "unreasonableness" was not only prejudicial for its indefiniteness but it was a misstatement of the current products liability law of New Jersey, as the following analysis shows.

The "unreasonably dangerous" standard set forth in the Restatement of Torts (Second) § 402(a) is an attempt

"to foreclose the possibility that the manufacturer of a product with inherent possibilities for harm (for example, butter, drugs, whiskey, and automobiles) would become 'automatically responsible for all the harm that such things do in the world.' (Prosser, Strict Liability for the Consumer in California (1966), 18 Hastings L. J. 9, 23)." Cronin v. J. B. E. Olson Corp., 501 P.2d 1153, 1161.

In Cronin, supra, the California Supreme Court considered whether the Restatement standard should be applied in a suit brought by the driver of a bread truck against the manufacturer of the bread racks carried in the truck on account of enhanced injuries received when his truck collided with a car. As a result of the impact, an aluminum safety hasp which was just behind the driver's seat--and which was designed to hold the bread trays in place--broke, causing the loaded trays to strike the plaintiff in the back, throwing him through the windshield. The defendant appealed the trial judge's refusal to charge the jury that it must find the defect in the hasp "unreasonably dangerous" before it could find the defendant liable.

The California Supreme Court refused to adopt the Restatement standard, saying (501 P.2d at pp. 1161-1162):

"The result of the [unreasonably dangerous] limitation, however, has not been merely to prevent the seller from becoming an insurer of his products with respect to all harm generated by their use. Rather, it has burdened the injured plaintiff with proof of an element which rings of negligence. As a result, if, in the view of the trier of facts, the 'ordinary consumer' would have expected the defective condition of a product, the seller is not strictly liable regardless of the expectations of the injured plaintiff. If, for example, the 'ordinary consumer' would have contemplated that Shopsmiths posed a risk of loosening their grip in letting the wood strike the operator, another Greenman might be denied recovery. In fact, it has been observed that the Restatement formulation of strict liability in practice rarely leads to a different conclusion than would have been reached under laws of negligence. [Citations omitted.] Yet the very purpose of our pioneering efforts in this field was to relieve the plaintiff from problems of proof inherent in pursuing negligence (*Escola v. Coca Cola Bottling Co.*, supra, 24 Cal. 2d 453, 461-462, 150 P.2d 436, Traynor, J, concurring) and warranty (*Greenman v. Yuba Power Products, Inc.*, supra, 59 Cal. 2d 57, 63, 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901) remedies, and thereby 'to insure that the costs of injuries resulting from defective products are born by the manufacturers ....' [Citation omitted]."

The court in Cronin found that the unreasonably dangerous standard "would place a considerably greater burden upon [plaintiff] than that articulated in Greenman." 501 P.2d at 1163. The Greenman rule, however, has been ex-



plicitly adopted by the Supreme Court of New Jersey. See Schipper v. Levitt & Sons., 44 N.J. 70, 207 A.2d 314, 325 (1965). Moreover, the New Jersey Supreme Court has been ready to reject the formulation of Restatement (Second) § 402(a) where it has been shown to conflict with the "public interest in assuring that safety devices are installed." Bexiga v. Havir Mfg. Corp., supra, 290 A.2d 281, 285. As a result, in the only reported New Jersey case considering the question, the "unreasonably dangerous" standard of Restatement § 402(a) has been held to play "no role in the [New Jersey] common law concept of strict liability in tort." Glass v. Ford Motor Co., 123 N.J. Super. 599, 304 A.2d 562 (Law Div. 1973).

Not only did the charge of Judge Weinfeld that the jury must find that the latch defect posed an "unreasonable risk of injury" misstate the law of New Jersey; it also substantially confused an already complex record. No one could suggest that the absence of a safety device such as the door latch of a truck would be other than foreseeably dangerous and the issue should not have been submitted to the jury at all. Indeed, GMC made no attempt to prove that a nonburst latch would not have improved the safety of Lane's truck. Quite to the contrary, defendant's

witness Forrester admitted that nonburst latches increased the safety of passenger cars during collisions (T 1513-1514). GMC did not even deny that accidents involving trucks mounting high curbs or sustaining high torsional forces were contemplated in the design of the 7500 vehicle. To the contrary, Forrester testified that in designing the 7500 series truck GMC contemplated that the vehicle would encounter a large boulder or high curb (T 1533-1534), a collision (T 1533) or torsional forces such as were simulated by the twist ditch and the Belgian block course (T 1449-1450). Dr. Morfopoulos also testified that a one-foot ditch or one-foot curb would be considered a "severe normal load" for the vehicle (T 1643-1644). GMC's defense was simply that the lack of a safety latch was not a proximate cause of the injury: either because Lane himself inadvertently opened the door (Forrester, T 1537-1538) or because any latch, including a safety or nonburst latch, would have opened under identical circumstances (Forrester, T 1488, Morfopoulos, T 1729-1730). The only question for the jury, then, was that of proximate cause, that is, whether the jury believed the testimony of defendant's witnesses that any latch would have opened when the rear of Lane's truck obliquely hit the median curb at approximately 25 miles an hour. By failing to focus the jury's attention on this narrow point and instead charging again and again as to "defect",

"intended use" and "unreasonable risk of injury" , Judge Weinfeld permitted a miscarriage of justice which this Court may and should correct.

- D. The confusion in the charge was compounded by the inclusion of the seat belt defense.

So strong is the "public interest in assuming that safety devices are installed," Bexiga v. Havir Mfg. Corp., 290 A.2d 281, 285, that the defense of contributory negligence is unavailable in such a case because "It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against," ibid. at p. 286. In light of that policy it would have been error to charge that plaintiff Lane could be barred by contributory negligence and it was equally erroneous to charge that the damages due David Lane and his wife for General Motors' failure to provide a safety nonburst latch could be mitigated by David Lane's failure to use the seat belt. Otherwise the policy concerning the duty to provide safety devices would be diluted by permitting the manufacturer to provide a substitute device for the safety latch which the state of the art mandated be used on the truck.

Notwithstanding the clear New Jersey law on the point, Judge Weinfeld referred to defendants' contention



that David Lane

"by his own lack of care, contributed to the injuries which in any event would mean the damages should be reduced accordingly" (T 2417),

then charged with respect to the latch system that the jury could find for plaintiff if the system was not reasonably fit to avoid increased risk of injury (T2430-2433) but concluded that portion of the charge with the statement (T 2433):

"As to the claim of increased injuries, I shall again refer to this in instructing you on damages in the event you reach that issue"

and in the damages portion of the charge referred (T 2444-2445) to

"defendants' contention with respect to the failure of plaintiff to wear the seat or the lap belt, as it was referred to, at the time of the accident, and that he failed to exercise a reasonable degree of care for his own safety"

and instructed the jury (T 2445-2446) that if it found that plaintiff was negligent in not wearing a seat belt and that such conduct was a proximate cause of his sustaining injuries he otherwise would not have sustained, plaintiff was to be compensated only for those injuries he would have sustained had the seat belt been worn.

While it is true that the jury did not answer Question 7, which put to them the issue whether:

" . . . David Lane was negligent because he did not wear the lap belt and thereby increased the severity of his injuries" (T 2449-2450),

it is evident that on the latch system claim, which related solely to increased injury as a result of the absence of a safety door latch, the seat belt defense, the purpose of which was to negate a finding of the same increased injuries, could well have caused the jury to conclude that the enhanced injury claim and the increased injury defense simply washed each other out and that, therefore, there was no liability. Especially is this so in light of the reference in the charge to the opinion of General Motors' expert

" . . . that had plaintiff worn a seat belt, he would not have sustained the spinal cord injury which resulted in paraplegia, that his injury would have been of a minor nature" (T 2445).

Under the circumstances of this case, what in any other case would be a partial defense in mitigation of damages constituted in fact a complete defense that plaintiff's own negligence caused the increased injuries for which by the latch system claim he sought to recover. The court's charge of the seat belt defense was, therefore, tantamount to a charge that GMC could be found not liable if David Lane's failure to wear the seat belt was a proximate cause of the injuries which he claimed.

The charge was in clear violation of New Jersey law, and, in a hard fought, complex and difficult case, at the very least compounded the other errors in the charge noted above.

- E. The court's failure to respond appropriately to the jury's question "Did anyone testify why safety nonburst locks were not used on trucks in June (June 2, 1967)?" constitutes reversible error.

The essential inquiry in an automobile products liability case charging improper design, apart from the issue of proximate cause, is whether the defendant used

"reasonable . . . care in the design of its vehicle consonant with the state of the art to minimize the effect of accidents." Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968).

To meet this issue, plaintiff's witness Ehrlich testified that safety or nonburst latches came out in about 1956 (T 641). Plaintiff's witness Severy testified that nonburst latches were developed around 1954 (T 972). He further testified that plaintiff's Exhibit 76 in evidence was a nonburst latch used on a '64 Chevelle and a '65 Corvair that had been developed by GMC (T 975) and that antiburst latches were used in 1962 Ford trucks and 1963 Dodge and Chrysler trucks (T 972, 1061). Severy also testified that



there was no difference in the principle upon which these locks worked in trucks or cars (T 971, 982). The defendant GMC chose to offer no evidence as to why safety latches were not used in the 7500 series truck in which plaintiff Lane was injured, or to refute the testimony of plaintiff's witnesses that such latches had been in use on Ford trucks since at least 1962 and Dodge and Chrysler trucks since 1963. As for the testimony of plaintiff's witnesses that the latches had been developed in 1954 or 1956, and had been in use on passenger cars for some time, defendant's witness Forrester admitted, after strenuous cross-examination, that safety latches had probably been introduced before 1965 (see T 1510-1512).

As previously noted, since defendant GMC chose not to meet plaintiff's proof that safety latches were available at the time the truck in which Lane was injured was manufactured, and that such latches were an improvement over the latch installed in the Lane truck, it was error for Judge Weinfeld to leave the issue of defect to the jury. The only issue which GMC chose to defend was that of proximate cause and the judge's charge should have related solely to that.

Having left the issue of defect to the jury, however, it was necessary for the jury to determine whether

the state of the art in 1967 was such that safety latches were available in the industry and whether the 7500 series latch offered less protection than a nonburst latch. In its deliberations the jury obviously addressed itself to these questions, since approximately an hour and 25 minutes after they retired, they sent in a note to the court requesting that they be given the 7500 series lock and pictures of the lock (T 2457) and approximately one and a half hours thereafter sent in the following note:

"Did anyone testify why safety nonburst locks were not used on trucks in June (June 2, 1967)?" (T 2459)

The obvious answer to the above question was that Severy testified that safety nonburst locks were being used on trucks in June 1967 and had in fact been in use since 1962. Nevertheless, after colloquy with counsel for both sides, and having obtained their concurrence, the judge responded to the jury:

"I have discussed the matter with the lawyers. My own recollection is that there is no such testimony, and the lawyers also agree that no one has any recollection that the specific question was asked of any witness. And that is the state of the record." (T 2460).

The Court's response to the jury's question was the death knell to plaintiff's claim that the latch was defective. If no testimony had been offered that safety latches were in use at the time the truck was delivered to plaintiff's employer, clearly plaintiff had not sustained

his burden of proof that GMC's latch design was not in conformance with the state of the art. This was the obvious conclusion of the jury which returned approximately 30 minutes later with a verdict for defendants (T 2461). There is no doubt counsel for the parties, and particularly counsel for plaintiff, had equal responsibility with the court to propose an appropriate response to the jury's question. In fact, counsel for defendant Pitman voiced his concern that the jury's question contained an incorrect premise, but stifled his objection when he was unable to immediately cite the relevant testimony in the record as requested by the court (T 1245a). Nevertheless, it is the plaintiff, David Lane, who incurred substantial and lifelong injuries as a result of his accident, and it is he who is entitled to substantial justice in the trial of his cause. Whatever the explanation for the failure of the court and the attorneys to respond correctly to the jury's question relating to the central issue before it, be it exhaustion at the end of a long and difficult trial or some other reason, David Lane is entitled to a new trial so that the proof he adduced may be intelli-



gently considered by a jury.\*

### Conclusion

In misstating plaintiff's theory of the proof as to proximate cause, in misapplying the law of New Jersey as it relates to a manufacturer's strict liability for injuries caused by its failure to provide safety latches which were generally available in the industry, in improperly charging as to the defenses available to GMC, including the negligence of plaintiff, in failing to narrow and define the issues before the jury and in incorrectly responding to a question from the jury on the primary fact issue relating to improper design, the trial judge committed plain error. To avoid a serious

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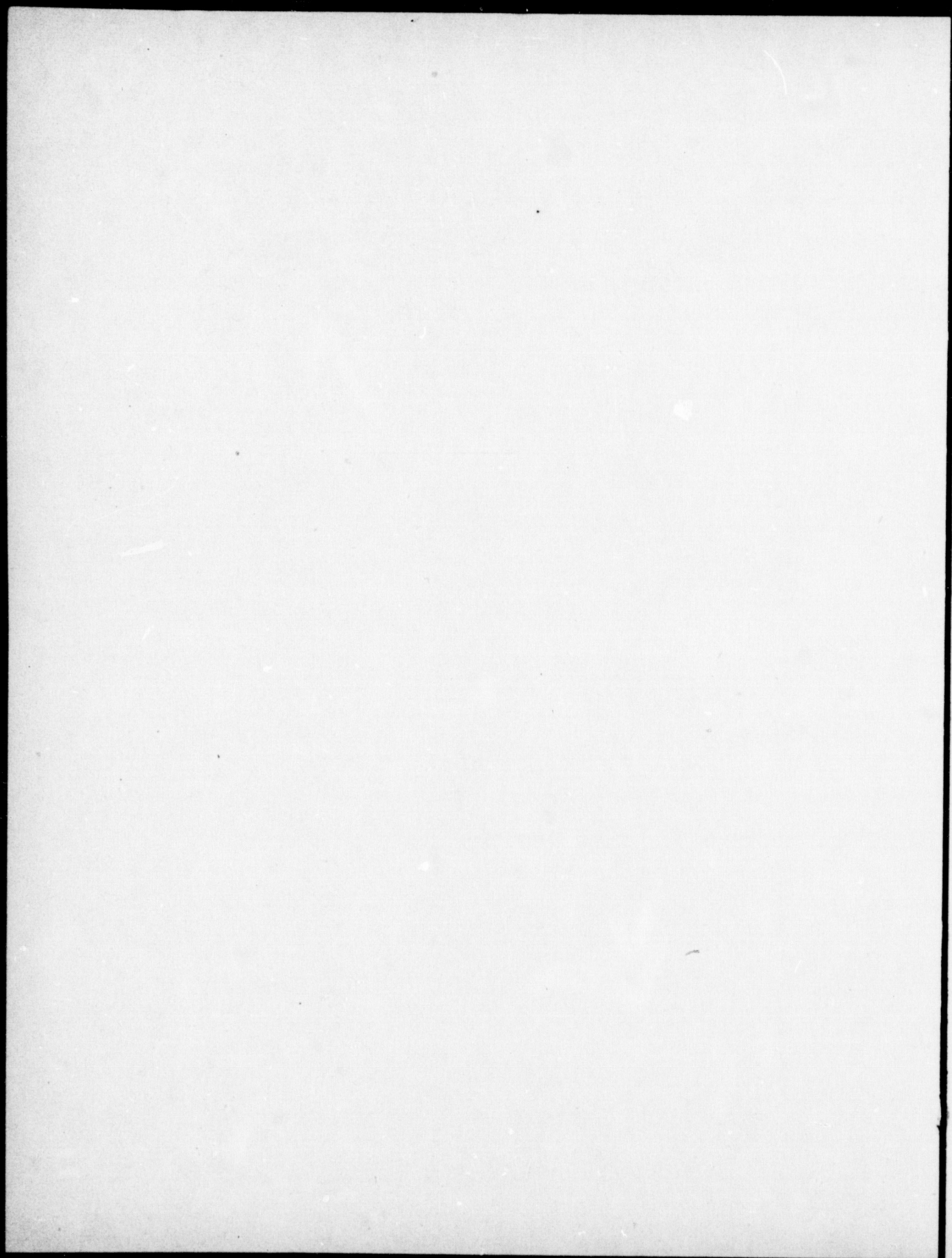
\* In Barnett v. Love, 294 F.2d 585 (4th Cir. 1961), the judge properly charged the jury in a negligence action involving a collision between automobiles driven by the plaintiff and the defendant. After retiring, the jury returned to the courtroom and the foreman asked the court the following question: "I think the way I understand the charge, that we had to find one person was guilty of carelessness." The court replied: "Carelessness or negligence . . ." (294 F.2d at 587). On appeal, a new trial was ordered. "The subsequent concurrence by the trial judge in the foreman's misstatement of the law that the jury must find one party or the other guilty of carelessness or negligence may well have misled the jury, with resulting prejudice to the defendants." (294 F.2d at 587, italics in original). Compare, Huston v. De Leonardis, 44 A.D.2d 110 (1st Dep't 1974).

miscarriage of justice, this Court should reverse the judgment of March 20, 1974 dismissing the complaint and remand for a new trial.

Respectfully submitted,

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SIMPSON THACHER  
& GORTLETT

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the within **BRIEF** is

herby admitted this **15th** day

of **OCTOBER**, 1924

*[Signature]*

Attorney for